Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-12-408 OF 1998
NIK HASHIM J
10 DECEMBER 2001

***Contract** — Breach — Damages — Claim for damages — Whether actual loss must be proved — Nominal damages awarded*

The appellant was the main contractor in respect of electrical works being carried out at Megah Court, Jalan Kolam Air, Kuala Lumpur in 1990. The respondent was the appellant's subcontractor doing the actual electrical works. By the subcontract, the appellant received 12½% of the contract sum of RM248,849, ie RM31,106.13. A few days after signing the subcontract, the appellant took over the respondent's contract works, as the appellant was not satisfied with it. The respondent argued that the appellant's action was a breach of the subcontract and claimed the profit he would have made had he been allowed to continue with the subcontract work, ie a 12½% profit of the subcontract price of RM217,742.87, ie RM27,217.86 as the claim for the amount arose from the breach of the contract. The learned judge agreed with the respondent's submission and allowed the award. The appellant appealed against the sessions court judge's decision.

Held, allowing the appeal with costs only in regard to the award of the damages of RM27,217.86, setting aside the sessions court's award and awarding nominal damages of RM10:

(1) On the question of liability, the court agreed with the learned judge that the appellant was in breach of the subcontract (see p 249H–I).

(2) In a claim for an agreed sum, there is clearly a distinction between a claim for payment of an agreed sum and a claim for damages. In the present case, the respondent's claim was not a claim for payment of a debt but a claim for damages, and as such, the respondent must prove the actual loss or damages, which it failed to do. The amount claimed was substantial. The respondent had not tendered any proof through his witnesses nor through supporting documents or agreement that its profit was RM27,217.86. The respondent failed to provide factual evidence of how this profit was derived at. Without such evidence, the award of RM27,217.86 was erroneous and ought not to be awarded by the learned judge, as the 12½% profit was never fixed by agreement of both the parties as payable to the respondent for the breach of contract by the appellant. On the contrary, it was provided in the letter of award that it was the appellant who was entitled to 12½% of the total contract sum (see p 250A, C–E).

[Bahasa Malaysia summary

Perayu adalah kontraktor utama bagi kerja-kerja elektrik yang dijalankan di Megah Court, Jalan Kolam Air, Kuala Lumpur pada tahun 1990. Responden adalah sub-kontraktor perayu yang menjalankan kerja-kerja elektrik sebenar. Melalui subkontrak tersebut, perayu telah menerima 12½% dari jumlah kontrak sebanyak RM248,849, iaitu RM31,106.13. Beberapa hari selepas menandatangani subkontrak tersebut, perayu telah mengambilalih kerja-kerja kontrak responden, kerana perayu tidak berpuashati dengannya. Responden berhujah bahawa tindakan perayu adalah suatu keingkaran akan subkontrak tersebut dan meuntut keuntungan yang beliau mungkin akan perolehi sekiranya beliau dibenarkan untuk meneruskan kerja subkontrak tersebut, iaitu keuntungan sebanyak 12½% dari harga subkontrak tersebut sebanyak RM217,742.87, iaitu RM27,217.86 kerana tuntutan untuk jumlah tersebut berbangkit daripada keingkaran kontrak tersebut. Hakim yang arif bersetuju dengan penghujahan responden dan telah membenarkan award tersebut. Perayu telah merayu terhadap keputusan hakim mahkamah sesyen.

Diputuskan, membenarkan rayuan tersebut dengan kos berhubung dengan award ganti rugi sebanyak RM27,217.86, mengetepikan award mahkamah sesyen dan memberikan ganti rugi nominal sebanyak RM10:

(1) Berhubung dengan persoalan liabiliti, mahkamah bersetuju dengan hakim yang arif bahawa perayu telah mengingkari subkontrak tersebut (lihat ms 249H–I).

(2) Dalam sesuatu tuntutan untuk suatu jumlah yang dipersetujui, terdapat perbezaan yang jelas antara tuntutan untuk pembayaran jumlah yang dipersetujui dan tuntutan untuk ganti rugi. Dalam kes semasa, tuntutan responden bukannya suatu tuntutan untuk pembayaran hutang tetapi suatu tuntutan untuk ganti rugi, dan oleh yang demikian, responden mesti membuktikan kerugian sebenarnya atau ganti rugi, yang mana ia gagal untuk lakukan. Jumlah yang dituntut adalah substansial. Responden telah tidak mengemukakan sebarang bukti melalui saksi-saksinya ataupun dokumen-dokumen sokongan atau perjanjian bahawa keuntungannya adalah RM27,217.86. Responden gagal memberikan keterangan faktual mengenai bagaimana keuntungan ini dicapai. Tanpa keterangan yang sedemikian, award sebanyak RM27,217.86 adalah salah dan tidak sepatutnya diawardkan oleh hakim yang arif, kerana keuntungan 12½% tersebut tidak pernah ditetapkan melalui perjanjian kedua-dua pihak sebagai kena dibayar kepada responden kerana keingkaran kontrak oleh perayu. Sebaliknya, telah diperuntukkan dalam surat award bahawa perayu yang berhak kepada 12½% dari keseluruhan jumlah kontrak tersebut (lihat ms 250A, C–E).]

A **Notes**

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1986–1999.

B **Cases referred to**

Bonham-Carter v Hyde Park Hotel Hotel [1948] WN 89 (refd)
Livingstone v Rawyards Coal Co (1880) 5 AC 25 (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)

C *Renu Zechariah* (*Ashley Onn Boon See* with him) (*Anad & Noraini*) for the appellant.
Joginder Singh (*Manjeet Kaur* with him) (*Joginder Singh & Co*) for the respondent.

D **Nik Hashim J**: This is an appeal by the appellant against the decision of the learned sessions court judge given on 6 August 1998 in allowing the respondent's claim for damages for breach of contract and awarded RM27,217.86, plus interest and costs against the appellant.

Briefly, the facts of the case are that the appellant was the main contractor in respect of the electrical works being carried out at Megah E Court, Jalan Kolam Air, Kuala Lumpur in 1990. The respondent was the appellant's subcontractor doing the actual electrical works. By the subcontract agreement, the appellant obtained 12½% of the contract sum of RM248,849, ie RM31,106.13 as its profit. A few days after signing the subcontract, the appellant took over the contract works from the respondent because the appellant was not satisfied with the respondent's F performance under the subcontract. The respondent argued that the appellant's action was wrongful and in breach of the subcontract and that he was entitled to the profit he would have made had he been allowed to continue with the subcontract works. Since the appellant obtained a profit of 12½% under the subcontract, the respondent submitted it was only fair G and reasonable that the respondent must be entitled to a profit at 12½% of the subcontract price of RM217,742.87, ie RM27,217.86, as the claim for the said amount arose naturally from the breach and quoted *Livingstone v Rawyards Coal Co* (1880) 5 AC 25 (HL) in support.

The learned judge agreed with the respondent's submission and allowed the award accordingly. Hence, the appeal. H

After hearing both parties, I, on 27 April 1999 allowed the appeal with costs only with regard to the award of the damages of RM27,217.86, and set aside the award and awarded nominal damages of RM10 instead on the ground that the respondent had failed to prove the damages. On the question of liability, I agreed with the learned judge that the appellant was I in breach of the subcontract. However, the respondent was dissatisfied with my decision with regard to the award of the damages. Hence, my reasons for the decision.

In a claim for an agreed sum, there is clearly a distinction between a claim for payment of an agreed sum and a claim for damages. *Chitty on Contracts* (26th Ed) Vol 1, general principles at p 1119 para 1775 states:

> There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt ... the relevance of this distinction is that rules on damages do not apply to a claim for a debt, eg the plaintiff who claims payment of a debt need not prove anything more than his performance or occurrence of the event or condition; there is no need to prove actual loss suffered by him as a result of the defendant's failure to pay; the whole concept of remoteness of damage is therefore irrelevant. ...

In the present case, the respondent's claim is not a claim for payment of a debt but a claim for damages, and as such, the respondent must prove the actual loss or damages, which it failed to do. The amount claimed is substantial. The respondent had not tendered any proof through his witnesses nor through supporting documents or agreement that its profit was RM27,217.86. The respondent failed to provide factual evidence of how this profit was derived at. Without such evidence, the award of RM27,217.86 was erroneous and ought not to be awarded by the learned judge, as the 12½% profit was never fixed by agreement of both the parties as payable to the respondent for the breach of contract by the appellant. On the contrary, it was provided in the letter of award that it was the appellant who was entitled to 12½% of the total contract sum.

In this context, the respondent needs to be reminded of Lord Goddard's classical dictum in *Bonham-Carter v Hyde Park Hotel Hotel* [1948] WN 89 that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

The *Livingstone*'s case has no application to the instant case which claim is based on the law of contract. In that case, the miner, Coal Co, which was mining coal in adjoining lands, excavated coal from beneath the plaintiff's land wrongfully. As to what damages were payable to the plaintiff landowner, the House of Lords decided that the best evidence in the peculiar circumstances of the case was the value of the royalty paid by the miner Coal Co for the surrounding coal field and therefore, the plaintiff landowner was entitled to the lordship on the coal excavated, calculated at that rate. Clearly, the claim in *Livingstone* was for damages in tort and the principles for damages applicable in contract and tort, however, are not the same (see *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360). In my view, the principle for damages in tort cannot apply to damages in contract because the law requires that actual loss or damages in contract must be proven.

A Since the respondent failed to prove its damages, its claim must fail. The learned judge should not have accepted the sum prove his claim. It was therefore wrong for the learned judge to make such a substantial award without proof of damages. As it was quite impossible to assess damages with the evidence available, I accordingly made the award of nominal damages and to that extent, the appeal was allowed with costs.

B *Appeal allowed with costs only in regard to the award of the damages of RM27,217.86, the sessions court's award set aside and nominal damages of RM10 awarded.*

Reported by Chew Phye Ken

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